No. 381.

FILED
SEP 3 1902
JAMES H. McKENNEY,
Clerk.

Brf. of Poole for P. E.

Supreme Court of the United States.

Filed Sept. 3, 1902.

OCTOBER TERM, 1902.

No. 381.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA TO THE USE OF LEWIS E. SMOOT.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA TO REVIEW A JUDGMENT OF THAT COURT AFFIRMING A JUDGMENT OF THE SUPREME COURT OF THE DISTRICT.

BRIEF FOR PLAINTIFF IN ERROR.

L. H. POOLE,
Counsel for the Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 2882

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 381.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA TO THE USE OF LEWIS E. SMOOT.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA TO REVIEW A JUDGMENT OF THAT COURT AFFIRMING A JUDGMENT OF THE SUPREME COURT OF THE DISTRICT.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error adopts the following statement of the case by the Court of Appeals:

"The appellant is a surety company authorized to become surety on bonds given by contractors for public works in the District of Columbia, and appeals from a summary judg-

ment rendered against it under the 73d rule of the supreme court of the District.

"The bond was executed by appellant as surety for one Peyton D. Vinson with whom a contract for certain public work had been entered into by the District Commissioners, and which, in addition to securing the faithful performance of said contract, was intended also to secure the payment by the contractor for all labor and materials furnished him in the prosecution of his said contract. The bond is identical with that required by the act of Congress of August 13, 1894 (28 Stat., 278), relating to contracts with the United States, and was given under the act of February 28, 1899, making the same provision for contracts with the District of Columbia. (30 Stat., 906; R. S. Supp., vol. 2, part 8, p. 948.)

"The purpose and practical effect of this act is to create a special lien in favor of persons furnishing labor and materials to such a contractor, and to substitute the bond for the building, which, in private contracts, is the thing charged. Marble Co. *v.* Burgdorf, 13 App. D. C., 506, 519; Richards Brick Co. *v.* Rothwell, 18 App. D. C., 516, 536, 537.

"Appellee, as plaintiff below, procured a copy of the bond under the requirements of the statute, and filed his suit thereon, alleging the contract by Vinson with the District, the execution of the bond by Vinson as principal, and appellant, as surety, the furnishing of certain materials to said Vinson for the execution of his contract, the agreed price thereof, and the failure of Vinson to pay a balance due thereon of $536.06. These allegations were supported by an affidavit under the requirements of the 73d rule.

"The appellant filed six pleas, denying indebtedness and breach of the conditions of the bond.

"With these pleas was filed the following affidavit of defense.

'J. Sprigg Poole, being first duly sworn, deposes and says:

'1. That he is now, and for ten years last past has been, the general agent for the District of Columbia of The Fidelity and Deposit Company of Maryland, the defendant in the above-entitled cause.

'2. That the said defendant admits the execution of the bonds as alleged in the declaration in said cause.

'3. That the said defendant, its officers and agents, had no personal knowledge of the contracts alleged in said decla-

ration to have been entered into by and between Lewis E. Smoot and Peyton D. Vinson, or of the indebtedness alleged to be due from said Vinson to said Smoot under said alleged contracts; that the said defendant, its officers and agents, has not sufficient information, in the opinion of the affiant and of the counsel of said defendant, its attorney of record in said cause, to be safe in admitting or denying under oath the allegations of said declaration in regard to said contracts between said Smoot and Vinson, or the indebtedness thereunder, and in so far as said defendant is sought to be charged with the payment of said alleged indebtedness from Vinson to Smoot it calls for strict proof of said alleged indebtedness.

'4. That said defendant is advised by its counsel that it is entitled under the law of the land to trial by jury as to the truth of the allegations of the declaration in regard to said alleged contracts between the said Smoot and Vinson and the alleged indebtedness under said contracts; that said defendant does not waive, but expressly claims, the benefit of the right of trial by jury, and prays that this honorable court will not enter judgment against it, the said defendant, without trial by jury upon the issues tendered by the pleas filed to said declaration.

'That this prayer for trial by jury is not made for the purpose of delay, but solely because the defendant is advised by counsel and believes that, under the law of the land, it is entitled to trial by jury in this cause, and that it cannot waive or surrender that right without exposing itself to the danger of being deprived of its property without due process of law.'"

That affidavit of defense was held to be insufficient to satisfy the requirements of the rule, and summary judgment "for want of sufficient affidavit of defense" was rendered against the defendant (Rec., p. 9) and affirmed on appeal. Rec., p. 15.

ASSIGNMENT OF ERRORS.

1. The judgment was rendered without "due process of law," in violation of the fifth amendment of the Constitution.

2. The judgment was rendered without "trial by jury," in violation of the seventh amendment of the Constitution.

3. The judgment was rendered without "the mode of proof in the trial of actions at common law," prescribed by the Revised Statutes of the United States, sections 861 *et seq.*

4. It was error to render judgment under the 73d rule, because (*a*) the rule is void; (*b*) the causes of action are not within the purview of the rule; (*c*) plaintiff's affidavit is insufficient; (*d*) defendant's affidavit is sufficient.

5. The judgment should be reversed for other errors apparent on the record.

The same errors *in totidem verbis* were assigned in the Court of Appeals.

First Assignment.

The judgment was rendered "without due process of law," in violation of the fifth amendment.

There has been no judicial ascertainment of the facts necessary to sustain the judgment.

With the exception of the execution of the bonds in suit, which was admitted, the allegations of the declaration, upon which the summary judgment was rendered against the defendant, are neither admitted by the pleadings nor estabtablished by proof; there has been no judicial inquiry to ascertain their truth, and there is nothing in the record in the nature of a finding of facts. The judgment rests upon

the disputed and unproved allegations of the declaration, none of which (except the execution of the bonds) have been admitted or proved.

The learning upon the subject of "due process of law," as applied to judicial proceedings, is collected in the opinion of the court in Hovey *v.* Elliott, 167 U. S., 409, where the principle is reaffirmed that *judicial proceedings "cannot be valid unless they proceed upon inquiry and render judgment only after trial."* In that case this court declared void, upon collateral attack, a decree of the District supreme court entered against the defendant in a suit in equity upon the ground that the court had proceeded without due process of law in striking the defendant's answer from the files as a punishment for his contempt of court, taking the bill *pro confesso*, and then proceeding to decree against him without making any inquiry to ascertain the truth of the averments of the bill.

In that case this court said:

"Story, in his treatise on the Constitution (vol. 2, par. 1789), speaking of the clause in the 5th amendment, where it is declared that no person 'shall be deprived of life, liberty, or property without due process of law,' says: 'The other part of the clause is but an enlargement of the language of Magna Charta. * * * So that *this clause in effect affirms the right of trial according to the process and proceedings of the common law.*' * * * Again, in *Ex parte* Wall., 107 U. S., 289, the court quoted with approval the observations as to 'due process of law,' made by Judge Cooley in his Constitutional Limitations, at page 353, where he says: 'Perhaps no definition is more often quoted than that by Mr. Webster in the Dartmouth College case, 17 U. S., 4 Wheat., 518: "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, libery, property, and immunities under the protection of the general rules which govern society.'" And that the judicial department of the Government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by another observation of Judge

Cooley immediately following the language just quoted, saying: 'The definition here given is apt and suitable as applied to *judicial proceedings, which cannot be valid unless they proceed "upon inquiry" and render judgment only after trial.*' The necessary effect of the judgment of the supreme court of the District of Columbia was to decree that a part of the award made in favor of the defendant, in other words, his property, belonged to the complainants in the cause. The decree, therefore, awarded the property of the defendant to the complainants upon the hypothesis of fact that by contract the defendant had transferred the right in or to this property to the complainants. If the court had power to do this, by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to another without hearing or without due process of law?"

Upon the authority of Hovey *v.* Elliott this court reversed a decree of the Court of Appeals of the District for error, in part, in decreeing against a defendant without giving him an opportunity to produce evidence. Warner *v.* Godfrey, decided by this court June, 1902, not yet reported.

The action of the District supreme court, affirmed by the Court of Appeals, in rendering the judgment now under review was less summary than its action in entering the decree declared void in Hovey *v.* Elliott, for the present plaintiff in error was not deprived of the right to be heard, but in both cases alike the court rendered judgment without judicial ascertainment of the facts necessary to sustain the judgment. In that case the court "awarded the property of the defendant to the complainant upon the hypothesis of fact" that the averments of the bill were true without making any inquiry to ascertain the truth of those averments, and in this case the court awarded the property of the defendant to the plaintiff upon the hypothesis of fact that the allegations of the declaration were true without making any inquiry to ascertain the truth of those allegations. In both cases alike the hypothesis was unsupported by established facts; in both

cases alike the prayer of the defendant that the court would not render judgment without trial was denied.

Upon the authority of Hovey *v.* Elliott the plaintiff in error claims "the right of trial according to the process and proceedings of the common law;" it complains that it has been deprived of that right, and that this case was not tried according to the course of any law, written or unwritten, in force in the District, and that judgment was rendered against it without judicial ascertainment of the facts necessary to sustain the judgment, and it contends that the enforcement of a judgment so rendered would deprive it of its property "without due process of law."

Second Assignment.

The judgment was rendered without "trial by jury," in violation of the seventh amendment.

The allegations of the declaration traversed by the pleas have not been decided by a jury, although the right of trial by jury was expressly claimed. Rec., p. 7.

Barney *v.* Schmeider, 9 Wall., 248:

"As the defendant in this case did not waive his right to have the facts tried by a jury, it was the duty of the court to submit such facts to the jury that was sworn to try them. It is needless to say that this was not done. The statement is clear that the case was decided upon the testimony taken on a former trial, and not read before this jury, because the court had heard it in the first case, and did not deem it necessary to be heard by the jury in this case. * * * We never before heard of a case in which the jury were permitted, much less instructed, to find a verdict for the plaintiff on evidence of which they knew nothing except what is detailed to them in the charge of the court. It is obvious that if such a verdict can be supported here, when the very act of the court in doing this is excepted to and relied on as error, the trial by jury may be preserved in name, but will be destroyed in its essential value, and become nothing but

the machinery through which the court exercises the functions of a jury without its responsibility. It is insisted, with much ingenuity, that in this case there was no disputed fact for the jury to pass upon, and that the only issue in the case being one of law, it was proper for the court to dispose of it. If this were so, the instruction of the court might be sustained, *provided the undisputed facts necessary to sustain the verdict had been submitted to the jury.* But let us see if this assumption is supported by the record. *The form of the pleadings shows nothing and admits nothing. The plaintiff then must make a case by evidence to the jury.*"

Hodges *v.* Easton, 106 U. S., 408:

"The record discloses that the defendants had a determination by the jury of a part of the facts, while other facts, upon which the final judgment was rested, were found by the court to have been conceded or not disputed. If we should presume that there were no material facts considered by the court beyond those found in the answers to special questions, then, as we have seen, the facts found do not authorize the judgment. If, on the other hand, we should adjudge it to have been defendants' duty to preserve the evidence in a bill of exceptions, and that, in deference to the decisions of the State court, it should be presumed that the 'facts conceded or not disputed at the trial' were, in connection with the facts ascertained by the jury, ample to support the judgment, we then have a case at law, which the jury was sworn to try, determined, as to certain material facts, by the court alone, without a waiver of jury trial as to such facts. It was the province of the jury to pass upon the issues of fact, and it was the right of the defendants, secured by the Constitution of the United States, to have them do so. That right could have been waived, but it could not be taken from them by the court. *If, upon the trial, all the facts essential to recovery had been undisputed, or so conclusively established the cause of action as to have authorized the withdrawal of the case altogether from the jury, by a peremptory instruction to find for the plaintiffs, it would still have been necessary that the jury make its verdict,* albeit in conformity with the order of the court. The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and itself determine the remainder, without a

waiver by the defendants of a verdict by the jury. In civil cases other than those in equity and admiralty, and except when it is otherwise provided in bankruptcy proceedings, '*the trial of issues of fact*'—*that is, of all material issues of fact*—'*in the circuit courts shall be by jury,*' unless the parties or their attorneys of record stipulate in writing for the waiver of a jury. R. S., secs. 648, 649. There is no such stipulation in this case, and there is nothing in the record from which such stipulation or waiver may be inferred. It has often been said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people."

Baylis *v.* Insurance Co., 113 U. S., 316:

"Without a waiver of the right of trial by jury, by consent of parties, the court errs if it substitutes itself for the jury and passing upon the effect of the evidence, finds the facts involved in the issue, and renders judgment thereon. That is what was done in the present case. *It may be that the conclusions of fact reached and stated by the court are correct and, when properly ascertained, that they require such a judgment as was rendered. That is a question not before us.* The plaintiff in error complains that he was entitled to have the evidence submitted to the jury and to the benefit of such conclusions of fact as it might justifiably have drawn; a right he demanded and did not waive; and that he has been deprived of it, by the act of the court in entering a judgment against him on its own view of the evidence, without the intervention of a jury. In this particular, we think error has been well assigned. The right of trial by jury in the courts of the United States is expressly secured by the seventh article of the amendment to the Constitution, and Congress has, by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury, only when the parties waive the right to a jury by a stipulation in writing. R. S., 648, 649. This constitutional right this court has always guarded with jealousy."

The principles declared in those cases were violated in this. If it can be said that the allegations of the declaration traversed by the pleas have been decided at all, they were

decided by the court without the intervention of a jury. The fact that no jury was sworn could not authorize the court to do what it had no authority to do if a jury had been sworn.

Third Assignment.

The judgment was rendered without "the mode of proof in the trial of actions at common law," prescribed by the Revised Statutes of the United States, sections 861 *et seq.*

There is nothing in the record in the nature of evidence in support of the allegations of the declaration traversed by the pleas, unless the *ex parte* affidavit of the plaintiff is to be regarded as evidence, and it is not clear from the record whether that was or was not treated as evidence.

In *Ex parte* Fisk, 113 U. S., 713, this court discharged the petitioner, who had been adjudged guilty of contempt, and committed by an inferior Federal court for refusing to obey an order of that court directing him, as a defendant in an action at law, to submit to an examination by his adversary in advance of trial. This court said:

"The case before us is evidently one of evidence and procedure. The object of the orders is to procure evidence to be used on the trial of the case, and this object is effected by a proceeding peculiar to the courts of New York, resting alone on a statute of that State. There can be no doubt that if the proceeding here authorized is in conflict with any law of the United States, it is of no force in the courts of the United States. We think it may be added further in the same direction, that if Congress has legislated on this subject and prescribed a definite rule for the government of its courts, it is to that extent exclusive of any legislation of the States in the same matter. * * * Coming to consider whether Congress has enacted any laws bearing on the question before us, we find the following sections of the Revised Statutes, in chapter XVII, on evidence, which we quote here together." * * *

After quoting sections 861 *et seq.*, the opinion proceeds:

"No one can examine these provisions for procuring testimony to be used in the courts of the United States and have any reasonable doubt that, so far as they apply, they were intended to provide a system to govern the practice, in that respect, in those courts. They are, in the first place, too complete, too far-reaching and too minute to admit of any other conclusion. But we have not only this inference from the character of the legislation, but it is enforced by the express language of the law in providing a defined mode of proof in those courts, and in specifying the only exceptions to that mode which shall be admitted. This mode is 'by oral testimony and examination of witnesses in open court, except as hereinafter provided.' Of course the mode of producing testimony under the New York code, which was applied to petitioner, is not oral testimony and examination of a witness in open court, within the meaning of this act of Congress. This obviously means the production of the witness before the court at the time of the trial, and his oral examination then; and it does not mean proof by reading depositions, though those depositions may have been taken before a judge of the court, or even in open court, at some other time during the trial. They would not, in such case, be oral testimony. * * * These are the exceptions which the statute provides to its positive rule that the mode of trial in actions at law shall be by oral testimony and examination of witnesses in open court. They are the only exceptions thereinafter provided. Does the rule admit of others? Can its language be so construed? On the contrary, *its purpose is clear to provide a mode of proof in trials at law to the exclusion of all other modes of proof;* and because the rigidity of the rule may, in some cases, work a hardship, it makes exceptions of such cases as it recognizes to be entitled to another rule, and it provides that rule for those cases. *Every action at law in a court of the United States must be governed by the rule, or by the exceptions which the statute provides.* There is no place for exceptions made by State statutes. The court is not at liberty to adopt them, or to require a party to conform to them. It has no power to subject a party to such an examination as this. Not only is no such power conferred, but it is prohibited by the plain language and the equally plain purpose of the acts of Con-

gress, and especially the chapter on evidence of the revision. The New York statute would, if in force, repeal or supersede the act of Congress."

This also is "an action at law in a court of the United States," and therefore "must be governed by the rule, or by the exceptions which the statute provides." If the *ex parte* affidavit of the plaintiff was treated as evidence, it was improperly so treated, for it was not the "mode of proof" prescribed by Congress, "to the exclusion of all other modes of proof;" and if it was not treated as evidence, then judgment was rendered in favor of the plaintiff without any evidence at all in support of the allegations of the declaration traversed by the pleas. In either aspect of the case, the defendant was deprived of the protection of the statutory mode of proof.

Fourth Assignment.

It was error to render judgment under the 73d rule, because—

(*a.*) The rule is void.

(*b.*) The causes of action are not within the purview of the rule.

(*c.*) Plaintiff's affidavit is insufficient.

(*d.*) Defendant's affidavit is sufficient.

The judgment does not profess to have been rendered upon any judicial ascertainment of the facts necessary to sustain it, but it was rendered, in the language of the judgment itself, "upon hearing the plaintiff's motion for judgment for want of sufficient affidavit of defense, it is considered that said motion be, and hereby is, granted." Rec., p. 9.

The 73d common-law rule of the District supreme court, under which the judgment was rendered, provides:

"In any action arising *ex contractu*, if the plaintiff or his agent shall have filed, at the time of bringing his action, an affidavit setting out distinctly his cause of action, and the sum he claims to be due, exclusive of all set-offs and just grounds of defense, and shall have served the defendant with copies of his declaration and of said affidavit, he shall be entitled to a judgment for the amount so claimed, with interest and costs, unless the defendant shall file, along with his plea, if in bar, an affidavit of defense denying the right of the plaintiff as to the whole or some specified part of his claim, and specifically stating also, in precise and distinct terms, the grounds of his defense, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part. And where the defendant shall have acknowledged in his affidavit of defense his liability for a part of the plaintiff's claim as aforesaid the plaintiff, if he so elect, may have judgment entered in his favor for the amount so confessed to be due.

"SEC. 2. The provisions of this rule shall not apply to defendants who are representatives of a decedent's estate except when the affidavit filed with the declaration sets forth that the contract sued on was directly with such representative, or that a promise to pay was made by him.

"SEC. 3. When the defendant is a corporation, the affidavit of defense may be made by an officer, agent, or attorney of such corporation." "Rules of the Supreme Court of the District of Columbia adopted at the April term, 1898," p. 28.

The purpose and effect of its rule is thus stated by the District supreme court:

"This seventy-third rule was adopted mainly to facilitate the collection of honest debts, and in favor of the creditor, requiring the plaintiff to verify his complaint under oath, and calling upon the defendant to state such facts in his plea or answer as would be a defense to the whole or some part of the cause of action. This proceeding rather resembles a bill of discovery in equity than a pleading at common law. It allows the plaintiff to purge the conscience of the

defendant under oath, calling upon him as his witness to prove the amount due him (the plaintiff), and if the plaintiff so elect, he may take judgment for the amount admitted to be due." 5 Wash. Law Rep., 130.

The rule is described by the District Court of Appeals as:

"The rule depriving a party under certain conditions of his right to a trial by jury in the regular mode of the common law." 5 App. D. C., 5.

(*a.*) The rule is void.

It is "inconsistent with the laws of the United States," and therefore the court had no authority to make it.

The question here is not the one that has been mooted below, whether, and to what extent, State legislatures under State constitutions and Congress under the Federal Constitution could adopt, consistently with constitutional limitations, the affidavit of defense system; while what Congress could not do in that respect no court could do, the converse is not true. But the question here is whether the District supreme court, in the exercise of the power conferred by section 65, District Code, to "establish rules of practice" "*not inconsisient with the laws of the United States*," can lawfully make a rule that works out the result in this case.

The rule is "inconsistent" with that provision of section 1 of the District Code which continues the "common law" in force in the District.

"To change the common law in the District after the cession, of course required an act of Congress." 147 U. S., 585.

While the manner of its application in this case is novel, trial by the affidavit of defense system is old. Blackstone says:

"A sixth species of trial is by wager of law, *vadiatio legis*, as the foregoing is called wager of battle, *vadiatio duelli;* because, as in the former case, the defendant gave a pledge,

gage, or *vadium*, to try the cause by battle; so here he was to put in sureties or *vadios* that at such a day he will make his law, that is, take the benefit which the law has allowed him. For our ancestors considered that there were many cases where an innocent man of good credit might be overborne by a multitude of false witnesses, and therefore established this species of trial, by the oath of the defendant himself; for if he will absolutely swear himself not chargeable, and appears to be a person of reputation, he shall go free and forever acquitted of the debt or cause of action. * * * Somewhat similar also to this is the *sacramentum decisionis*, or the voluntary and decisive oath of the civil law; when one of the parties to the suit, not being able to prove his charge, offers to refer the decision of the cause to the oath of his adversary; which the adversary was bound to accept, or tender the same back again; otherwise the whole was taken as confessed by him. But, though a custom somewhat similar to this prevailed in the city of London, yet in general *the English law does not thus, like the civil, reduce the defendant, in case he is in the wrong, to the dilemma of either confession or perjury*; but is indeed so tender of permitting the oath to be taken, even upon the defendant's own request, that it allows it only in a very few cases." 3 Black. Com., p. 342; 1 Pet., 596; *Ex parte* Fisk, *supra*; Boyd *v.* United States, 116 U. S., 616, *infra*; Union P. R. *v.* Botsford, 141 U. S., 250, *infra*.

Although the common law does not reduce the defendant to the "dilemma of either confession or perjury," the 73d rule not only reduces him to that dilemma, but in cases like this, where the defendant has no knowledge of the facts upon which he is sought to be charged, the rule goes further and reduces him to the dilemma of making his election, at a stage of the proceedings when he is not entitled to compulsory process to obtain the attendance of witnesses to ascertain those facts, of either surrendering the protection provided by the statutory mode of proof and the constitutional form of trial, or, at the risk of committing perjury, denying under oath the truth of facts of which he has no knowledge. Various statutes in force in the District, from time to time, have authorized summary judgment, without formal proof

and without trial by jury, in certain cases and under certain conditions; but no law, written or unwritten, now or heretofore in force in the District required the defendant in an action at law, as a prerequisite to the exercise of the right of trial by jury, to support his pleas by an affidavit of defense such as that required by the 73d rule.

As observed by the Court of Appeals of the District in the first case decided by it under the rule, if the defendant denies the allegation of the declaration in his affidavit of defense, and his denial prove to be false, "he has made a proper case for the criminal court." 1 App. D. C., 465. In other words, the defendant, in order to exercise the right of trial by jury and the right to demand proof of the facts upon which he is sought to be charged in cases where he has no knowledge of those facts—the very proof which, as declared by this court in Hovey *v.* Elliott, is an essential element of "due process of law"—must run the risk of making "a proper case for the criminal court." Under threat of criminal prosecution the defendant is coerced to surrender his right of trial by jury and his right to demand proof of the facts upon which he is sought to be charged. This is the effect of the rule which the Court of Appeals calls "a most salutary one for the speedy administration of justice." 1 App. D. C., 463. How can such "administration of justice" be reconciled with the sentiments so emphatically declared by this court in Hovey *v.* Elliott?

The rule is "inconsistent" with that provision of section 1 of the District Code which continues certain British statutes in force in the District, and also with section 1534 of the Code.

The common law required no verification of pleas, and the only statutes in force in the District changing the common law in that respect are (1) 4 Anne, ch. 16, sec. 11 (Chancellor Kilty's British Statutes in force in Maryland, p. 246), requiring dilatory pleas to be verified, and (2), section 1534 of the District Code (incorporating the provisions

of an old Maryland statute formerly in force in the District), requiring the plea of *non est factum* to be verified. See also section 1535, Code.

The rule enlarges the statutory requirement of verification of certain pleas into an affidavit of defense, and then extends this enlarged requirement to pleas not embraced within the terms of the statutes, but by necessary implication excluded therefrom, for the affirmative description of the cases in which the jurisdiction may be exercised implies a negative on the exercise of such power in other cases. 1 Cranch, 174.

The rule is "inconsistent" with section 70, District Code, which provides that issues of fact may be tried by the court without a jury whenever the parties voluntarily waive jury trial.

While Congress, in the exercise of its power of "exclusive legislation" over the District, has gone no further than to make provision for the voluntary waiver of the constitutional form of trial, the court, in the exercise of its power to "establish rules of practice" "not inconsistent with the laws of the United States," has gone much further, and enforces from the defendant involuntary surrender both of the statutory mode of proof and the constitutional form of trial.

The rule is "inconsistent" with the provisions of sections 1056 *et seq.* of the District Code relating to evidence. Those sections give no sanction to trial by *ex parte* affidavit.

The rule is "inconsistent" with section 1536, District Code, prescribing the form of summons:

SEC. 1536. "Summons.—In all common-law civil suits and actions in the District of Columbia the process for compelling the defendant's appearance shall be a summons in the following form:

"*Summons.*

"* * * to the defendant, ——, Greeting:

"You are hereby summoned to appear * * * to answer the plaintiff's suit * * * and in case you fail so to appear and answer, judgment will be given against you by default. * * *"

Though the defendant comply with the requirements of the summons to "appear and answer," judgment by default may be rendered against him for failure to comply with the superadded requirements of the 73d rule, of which requirements the summons gives him no notice. Thus the summons is converted by the rule into a trap to ensnare the defendant; and even when the defendant has knowledge of the rule judgment is rendered against him by default, in cases like the present, for failure to do what he cannot do without incurring the risk of making "a proper case for the criminal court" by denying under oath facts of which he has no knowledge.

The test adopted by this court for determining the validity of a statute is equally applicable for determining the validity of a rule of court:

"Counsel for plaintiffs in error contend that there is possibility of grievous wrong being done in carrying into effect the provisions of this statute, and say that the question of validity is to be determined not by the amount of wrong done in the present case, but by what may be done in other cases, quoting the language of Earl, J., in Stewart *v.* Palmer, 74 N. Y., 183, 188, 30 Am. Rep., 289: 'The constitutional validity of law is to be tested, not by what has been done under it, but what may, by its authority, be done.' This test is accurate, provided, of course, it is limited to what may rightfully be done, and does not extend to that which is wrongfully, though under pretense of the statute, done." 152 U. S., 170.

The rule is "inconsistent" with principles laid down, in cases where the rule is not involved, by the courts which sustain the rule.

The courts which affirm the validity of the rule characterize *ex parte* affidavits, upon which alone judgment is rendered under the rule, as "a kind of testimony the law abhors and never resorts to except in case of necessity." 1 MacA. (D. C.), 294. "They need the essential element and crucial test of cross-examination. They present more frequently the ingenious manipulation of counsel than the candid testimony of witnesses." 10 App. D. C., 373; 11 *ib.*, 85. Testimony thus discredited is substituted by the courts which discredit it for the "mode of proof" prescribed by Congress.

The rule is "inconsistent" with the common-law principle governing the burden of proof:

"In ejectment, as in all other cases, it is incumbent on the plaintiff to prove his case; not on the defendant in the first instance to disprove it." 8 App. D. C., 115.

"The affirmative is upon the plaintiff, and to require the defendant to take the burden of establishing a negative is to reverse the natural order of pleading and proof." 11 App. D. C., 175.

"When a party comes into court for relief it is incumbent upon him to show the existence of facts to justify the interference of the court." 11 App. D. C., 201.

"On application to the courts, there is always a burden of proof, slight though it may often be, upon him who has the affirmative, and if he fails to discharge it with evidence reasonably sufficient for the purpose, he must suffer the consequences of failure. His opponent succeeds, not upon proof of his own case or defense, but by reason of the absence of evidence on the necessary point." 18 App. D. C., 22.

Not only is the burden upon the plaintiff to prove his case, but to prove it moreover by the statutory mode of proof and the constitutional form of trial.

The rule is "inconsistent" with the principle that—

"Under our system of jurisprudence, a contested issue of fact at common law, in the absence of statutory provision authorizing or allowing a different mode, and the consent of parties to have recourse thereto, can only be determined by a trial before a jury of twelve men, and the unanimous ver-

dict of those twelve men upon the issue. Such a trial and verdict are essential prerequisites to the rendition of any judgment upon such issue of fact. They are the due process of law necessary to justify the existence of any such judgment, and without which the court is without jurisdiction to pronounce judgment." 12 App. D. C., 127.

Although that case was reversed in 174 U. S., 190, the grounds of the reversal do not affect the principle as applied to the facts in the present case.

"In the District of Columbia, the common law prevails, except as it may have been changed or modified by statute." 1 App. D. C., 57.

"Where it has not been repealed by express statutory provision, or modified by inconsistent legislation, or where it has not become obsolete or unsuited to our republican form of government, the common law of England in all its branches, both civil and criminal, remains today the law of the District of Columbia, and it has been repeatedly so held." 11 App. D. C., 466.

How is it possible to reconcile with that doctrine the validity of a rule of court "depriving a party under certain conditions of his right to a trial by jury in the regular mode of the common law"? 5 App. D. C., 5.

The rule is "inconsistent" with that provision of section 1 of the District Code which continues in force in the District "all general acts of Congress not locally inapplicable in the District of Columbia." This section re-enacts section 93, Revised Statutes of the District of Columbia, construed in Page *v.* Burnstine, 102 U. S., 664.

The rule is "inconsistent" with sections 861 *et seq.*, Revised Statutes of the United States, providing "the mode of proof in the trial of actions at common law." In support of this proposition the argument under the third assignment is in part relied upon.

The purpose of those statutes is "to provide a mode of proof in trials at law to the exclusion of all other modes of proof."

Ex parte Fisk, *supra;* Union P. R. *v.* Botsford, 141 U. S., 250, *infra.*

The rule is "inconsistent" with section 724, Revised Statutes of the United States.

"This proceeding (under the 73d rule) rather resembles a bill of discovery in equity than a pleading at common law." 5 Wash. Law Rep., 130, *supra.*

"*The only power of discovery or inspection, conferred by Congress, is to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.*" Union P. R. *v.* Botsford, 141 U. S., 250.

Boyd *v.* United States, 116 U. S., 616:

"The views of the First Congress on the question of compelling a man to produce evidence against himself may be inferred from a remarkable section of the judiciary act of 1789. The fifteenth section of that act introduced a great improvement in the law of procedure. The substance of it is found in section 724 of the Revised Statutes, and the section as originally enacted is as follows, to wit: 'All the said courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if the plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion as aforesaid, to give judgment against him or her by default.' The restriction of this proceeding to 'cases and under circumstances where they (the parties) might be compelled to produce the same (books or writings) by the ordinary rules of procedure in chancery,' shows the wisdom of the Congress of 1789. The court of chancery had for generations been weighing and balancing the rules to be

observed in granting discovery on bills filed for that purpose, in the endeavor to fix upon such as would best secure the ends of justice. To go beyond the point to which that court had gone may well have been thought hazardous. Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorent to the instincts of an Englishman; it is abhorent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."

Union P. R. *v.* Botsford, 141 U. S., 250:

"The Constitution, in the seventh amendment, declares that in all suits at common law, where the value in controversy shall exceed twenty dollars, trial by jury shall be preserved. Congress has enacted that 'the mode of proof in the trial of action at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided,' and has then made special provisions for taking depositions. Rev. Stat., secs. 861, 863, *et seq.* The only power of discovery or inspection, conferred by Congress, is to 'require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery,' and to nonsuit or default a party failing to comply with such an order. Rev. Stat., sec. 724. * * * In *Ex parte* Fisk, just cited the question was whether a statute of New York, permitting a party to an action at law to be examined by his adversary as a witness in advance of the trial, was applicable after an action begun in a court of the State had been removed into the circuit court of the United States. It was argued that the object of section 861 of the Revised Statutes of the United States was to provide a mode of proof on the trial; and not to effect this proceeding in the nature of discovery, conducted in accordance with the practice prevailing in New

York. 113 U. S., 717. But this court, speaking by Mr. Justice Miller, held that this was a matter of evidence, and governed by that section, saying: * * * So we say here. The order moved for, subjecting the plaintiff's person to examination by a surgeon, without her consent and in advance of the trial, was not according to the common law, to common usage or to the statutes of the United States. The circuit court, to adopt the words of Mr. Justice Miller, 'has no power to subject a party to such an examination as this.'"

National Cash Register Co. *v.* Leland, 94 Fed. Rep., 502, circuit court of appeals, first circuit:

"The circumstances of the case at bar closely resemble those of *Ex parte* Fisk, and the reasoning of the court has an important bearing on the decision in this case. The Massachusetts interrogatories are sought as a 'mode of proof in trials at law.' The answers to them are not oral testimony, and therefore, to be admitted, must be brought within the exceptions specified in the Revised Statutes. * * * It is further contended by the plaintiff that the interrogatories in question are admissible as a statutory substitute for a bill of discovery in aid of an action at law, and are thus brought within the provisions of section 914 of the Revised Statutes. This view of the Massachusetts interrogatories was taken by the circuit court for this district in Bryant *v.* Leyland, 6 Fed., 125. We think the contention unsound. The supreme court has constantly maintained the distinction between the systems of law and equity, and has refused to adopt into the practice of the Federal courts any part of the practice of the State courts which confounds the two systems. Moreover, the provisions of section 914 apply only to suits at law in the Federal courts, and, in the absence of express language, can hardly be intended to introduce into the practice and procedure of such suits statutory procedure which is in its nature plainly equitable. We find, therefore, that it has been decided by the Supreme Court that, if the statutory interrogatories are to be treated as laying the foundation for a deposition, they are inadmissible in Federal practice, because a deposition is not authorized to be taken in such a case by the statutes of the United States; that an examination authorized by State statutes has

been excluded on this ground when such examination, though not altogether similar, was yet in most respects similar to the interrogatories in the case at bar, the grounds for the exclusion, as stated by the Supreme Court being largely applicable to the interrogatories in the case. We find, furthermore, that, if, these interrogatories are to be treated, not as questions put to a deponent, but as a statutory substitute for a bill of discovery, they are excluded as an encroachment upon that control of equity procedure which belongs to the Federal courts except when regulated in express terms by an act of Congress. For these reasons we think that the interrogatories were forbidden by Revised Statutes, and not authorized by section 914 of the Revised Statutes, or any other Federal law."

Like opinions are expressed and rulings made upon the authority of *Ex parte* Fisk, in 27 Federal Reporter, 184; 39 *ib.*, 414; 47 *ib.*, 554, 559, 710; 64 *ib.*, 307; 66 *ib.*, 424; 75 *ib.*, 94; 77 *ib.*, 242, and 81 *ib.*, 898.

These limitations upon the power to enforce discovery at law apply to the courts of this District. Sec. 1, District Code of 1902; 20 How., 195; Page *v.* Burnstine, 102 U. S., 664; 3 Cranch C. C., 646.

"In the supreme court of the District of Columbia, as in the circuit courts of the United States, the jurisdiction in equity is distinct from the jurisdiction at law, and equitable relief cannot be granted in an action at law." 135 U. S., 314.

If, then, the Federal courts are forbidden to enforce from a defendant in an action at law (except in the cases authorized by statute) discovery *in aid* of the statutory mode of proof, it must follow, *a fortiori*, that they are forbidden to enforce discovery *in substitution* of the statutory mode of proof.

The rule not only enforces discovery in cases forbidden by statute, but it even inverts the rule of discovery laid down by this court:

"The rule to be applied to a bill seeking a discovery from an interested party is that the complainant shall charge in his bill that the facts are known to the defendant and ought to be disclosed by him, and that the complainant is unable to prove them by other testimony." 10 Pet., 502.

In this case the rule exacted of defendant discovery of facts of which plaintiff has and defendant has not knowledge, and upon failure to make such discovery judgment was rendered against the defendant without trial and without proof.

The rule is "inconsistent" with the fifth amendment. Trial under the rule is not "trial according to the process and proceedings of the common law" or of any other law in force in the District. In support of this proposition, the argument under the first assignment is relied upon.

The rule is "inconsistent" with the seventh amendment. Trial under the rule is not "trial by jury." In support of this proposition the argument under the second assignment is, in part, relied upon.

"This seventy-third rule was adopted mainly to facilitate the collection of honest debts, and in favor of the creditor." 5 Wash. Law Rep., 130, *supra*. But how can it be known in advance of trial who is the "creditor" and what are "honest debts"? It is the function of the jury to ascertain and determine, under the direction of the courts, who are "creditors" and what are "honest debts." That function cannot be performed by the automatic action of a rule of court.

The purpose and effect of the rule is not so much to impose conditions upon the exercise of the right of trial by jury as it is to totally prevent the exercise of that right in cases where its exercise is, in the opinion of the court, unnecessary, although such cases are triable by jury according to the course of the common law, and have not been withdrawn from the course of that law by any statute in force in the District. In short, the rule substitutes the opinion of the judge for the judgment of the law as to when the protection

of the statutory mode of proof and the constitutional form of trial may be invoked by the defendant.

The rule imposes requirements unknown to the common law and not imposed by the statutes upon the exercise of a right guaranteed by the Constitution in terms unqualified and unlimited. The rule is even more onerous and less authorized than the rule of the Court of Claims declared void by this court upon the ground that, "instead of being a rule of practice, it was really an additional restriction of the exercise of jurisdiction by that court. It required the claimant to do what the acts of Congress giving the court jurisdiction did not require him to do before it would assume jurisdiction. * * * This was establishing a jurisdictional requirement which Congress alone had the power to establish." 13 Wall., 38. The 73d rule coerces the defendant to do what the law does not require him to do, and to make discovery which the law does not require him to make, before the court will permit him to exercise a right guaranteed by the Constitution, and, if he is unable to comply with the rule, he is deprived of the right.

In Bank of Columbia *v.* Okeley, 4 Wheat., 235, this court considered the question how far, consistently with public policy, a party would be permitted to voluntarily waive the right of trial by jury. The statute there under consideration—the charter of the old Bank of Columbia of this District—authorized summary execution, without formal proof and without trial, in favor of the bank, upon a verification of its claim, in actions upon bills and notes made negotiable at the bank. The validity of the statute was attacked upon the grounds, *inter alia*, that it violated the seventh amendment, and that proceedings under it were not due process of law. The court said:

"We readily admit that the provisions of this law are in derogation of the ordinary principles of private rights. * * * By making the note negotiable at the Bank of Columbia, the debtor chose his own jurisdiction; in consid-

eration of the credit given him, he voluntarily relinquished his claims to the ordinary administration of justice. * * * It is true, cases may be supposed, in which the policy of a country may set bounds to the relinquishment of private rights. And this court would ponder long before it would sustain this action, if we could be persuaded that the act in question produced a total prostration of the right of trial by jury, or even involved the defendant in circumstances which rendered that right unavailing for his protection. * * * If the defendant does not avail himself of the right given him, of having an issue made up, and the trial by jury, which is tendered to him by the act, it is presumable that he cannot dispute the justice of the claim. * * * The words are, that the right of trial by jury shall be preserved, which places it on the foot of a *lex pro se introducta*, and the benefit of it may therefore be relinquished. * * * With this explanation, there is nothing left to this individual to complain of. What he has lost, he has voluntarily relinquished, and the trial by jury is open to him, either to arrest the progress of the law in the first instance or to obtain redress for oppression, if the power of the bank has been abused."

All that was required of defendant, under that statute, in order to have a jury trial in the regular mode of the common law, was, in the language of the statute, to "dispute the whole, or any part of the said debt;" the statute required nothing in the nature of an affidavit of defense. In Bank of Columbia *v.* Sweeney, 2 Pet., 674, it was declared that the object of that provision of the statute was "expedition, not the ademption, of legal defenses," and, although it went no further than that, Chief Justice Marshall called it "this extraordinary act." But the 73d rule is more "extraordinary" than the act, for what defendant loses under the rule is more than he lost under the act, and what he loses under the rule he has not "voluntarily relinquished," but he has been involuntarily deprived of, and the conditions under which trial by jury is open to him under the rule are more onerous than those imposed by the act, and most extraordinary of all these important changes in the law, "in derogation of the

ordinary principles of private rights," have been wrought not by the legislative, but by the judicial department.

The whole trend of the opinions in the Bank of Columbia cases is against the validity of the 73d rule. There is nothing in those opinions that countenances the doctrine that a court can lawfully require of a defendant, as a condition precedent to the exercise of the right to claim the protection of the statutory mode of proof and of the constitutional form of trial, that he shall deny, under the sanction of an oath, the allegations of the declaration; such a doctrine would seriously impair, if not totally destroy, the right in all cases where defendant had no knowledge as to the truth of those allegations—the very cases in which the exercise of the right is most essential to the protection of the defendant.

"The people made the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will. But this supreme and irresistible power to make or to unmake resides only in the whole body of the people." 6 Wheat., 389.

"Where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and *to its entirety*. * * * Constitutional mandates are imperative. The question is never one of amount but of power. The applicable maxim is *obsta principiis*, not *de minimis non curat lex*." Fairbank *v.* United States, 181 U. S., 289.

When the people in their fundamental law declare that "the right of trial by jury shall be preserved," and impose no conditions upon the exercise of that right, what right had the judges to unmake what the people made by a rule of court, "depriving a party under certain conditions of his right to a trial by jury in the regular mode of the common law"? It cannot be denied that the rule does impair the right. As "the power to tax is the power to destroy" (Fairbank *v.* United States, *supra*), so the power to impair is the power to destroy. The power to impair and the duty to pre-

serve are inimical. It can make no difference in principle whether the power to impair is wielded by the legislative department, in the form of an act of Congress, or by the judicial department, in the form of a rule of court. The seventh amendment makes no distinction between actions *ex contractu* and actions *ex delicto*. If the court can impair the right in actions *ex contractu*, it can impair the right in actions *ex delicto*. If the court can impair one constitutional right it can impair all constitutional rights, and, *a fortiori*, all statutory and common-law rights.

If "due process of law" and "trial by jury" do not involve the right on the part of a defendant to demand proof of the facts upon which he is sought to be charged, especially when he makes oath that he has no knowledge of those facts and no such information in regard to them as would enable him to conscientiously affirm or deny them under the sanction of an oath, then those rights provide a very imperfect security for the citizen.

Hovey *v.* Elliott establishes the principle that a person cannot rightfully be deprived of his property "without due process of law" as a punishment for his failure to comply with an order of court, whether the order be salutary, valid, or otherwise, and whether the failure be willful, as in Hovey *v.* Elliott, or involuntary, and the result of inability to further comply, as in this case.

The rule, properly limited in its application, might, possibly, be less open to objection if the courts of this District composed a judicial system instead of forming part of that system of which this court is the head. This court has pointed out the confusion and uncertainties that would be introduced into the law if each court of that system were authorized to introduce, by rule of court, such novel systems of procedure as it might see fit to adopt and the increased burden that would be imposed upon this court by calling upon it to construe such new codes. 20 How., 523; 1 Black, 309.

Constitutional rights are uniform throughout the Union. Trial by jury in criminal cases under the Constitution is uniform. Callan *v.* Wilson, 127 U. S., 540; Sparf *v.* United States, 156 U. S., 51. Trial under the seventh amendment is uniform; it is according to "the common law of England and not the law of any one or more of the States of the Union." Capital Traction Co. *v.* Hof, 174 U. S., 23. But this uniformity of right under the Constitution could not be preserved, and the right might be different in every Federal court if each of those courts possess the power—and it is possessed by all, if possessed by one—to make rules "depriving a party under certain conditions of his right to a trial by jury in the regular mode of the common law." If there were no other objection to the power of the court to make the 73d rule, the objection that the exercise by the Federal courts of the power to make such rules would inevitably destroy uniformity of right under the Constitution would be fatal to the existence of the power. In order to preserve uniformity of right under the Constitution it is necessary that such conditions as may be validly imposed upon the exercise of constitutional rights come from Congress and not from the courts.

We come now to consider the principles and authorities upon which the rule has been sustained.

The district supreme court says:

"The rule in question was not adopted with a view of striking down the rights of parties litigant to a trial under the Constitution and the laws; and for a very good reason, no power existed in the court to do that. The Constitution has provided that a party may make up an issue and have a trial before a jury in all cases where the value in controversy exceeds $20. And this court did not propose to repeal the Constitution. * * * We had precedents for this rule in the jurisprudence of nearly every State. The only doubt we entertained was as to our power to make it. It was matter of serious misgiving to some of the members of the court whether it was not a species of legislation, and whether it was not a denial of the citizens' right under the Constitution. It cer-

tainly looked very much like the exercise of legislative rather than judicial power. But after mature deliberation the court adopted it as a rule of practice, and as such it was very generally acquiesced in by the bar. Still, the court had some misgivings about it, until a case went up from here to the Supreme Court of the United States, involving the power of this court to make rules of practice. That court construed the power given by the organic act of this court favorably to the view we had; and now all doubt has been removed by the action of the Supreme Court in a recent case (Smoot *v.* Rittenhouse), in which this rule has been upheld." Bank *v.* Hitz, MacArthur & Mackey, 199.

If this court has upheld the rule, that is the end of the matter; let us see, then, what was decided by this court in the unreported case of Smoot *v.* Rittenhouse, decided January 10, 1876.

It would be supposed that if this court upheld a rule of such important character and doubtful validity it would give the grounds of its decision. But the only opinion filed by this court is:

"The judgment is affirmed; no further opinion will be delivered."

Although the validity of the rule was challenged in that case, the record makes clear that the affirmance of the judgment did not necessarily involve the affirmance of the rule, and the fact that no reference to the rule is made in the opinion justifies the conclusion that the court did not find it necessary to decide the question of its validity, but left that question in abeyance until a case should arise where the decision of the question was necessary to the decision of the case. Smoot *v.* Rittenhouse was an action against the maker of a promissory note, in which defendant in one of his pleas pleaded (by way of confession and avoidance, or in abatement) that the debt due from him to the plaintiff had been attached in a certain other suit in the same court, but when the record vouched in support of that plea was produced it

showed that the plea was false, and that no such attachment had issued. That plea may have been regarded as having been tried by the record, as, in effect, upon an issue of *nul tiel* record, or it may have been regarded as a sham plea, and at common law a sham plea, proved to be false, was treated as no plea. Stephens' Pleadings, ch. 2, sec. 7, rule 11, p. 444. And, as to the other pleas, the defendant could not, under the law of the District, plead more than one plea as matter of right, but only by leave of court; and, under the circumstances, the court may have felt justified in refusing to consider the other pleas; but, however the decision in that case may have been reached, it cannot fairly be regarded as even tending to sustain the rule, much less as finally settling the question.

But, even if this court had sustained the rule as applied in Smoot *v.* Rittenhouce, such affirmance would not go far towards sustaining it as applied in this case. In Smoot *v* Rittenhouse defendant's liability under the terms of the note in suit was unconditional in character and certain in amount. In this case defendant's liability under the terms of the bonds in suit is conditional in character and uncertain in amount, depending upon facts *dehors* the bonds necessary to forfeit the bonds, to make defendant's conditional liability absolute, and to determine its amount. (This point is more fully considered under section (*b*), *infra.*)

Upon the organization of the District Court of Appeals the question was renewed. That court considered the question as still open and reaffirmed the rule. Cropley *v.* Vogeler, 2 App. D. C., 28.

Answering the objection that the rule was unconditional, the court said:

"*The evident meaning of the Constitution is that trial by jury, as it existed at the common law at the time of its adoption, should be preserved.*" Cropley *v.* Vogeler, *supra.*

But "trial by jury, as it existed at the common law," is

not "preserved" under a "rule depriving a party under certain conditions of his right to a trial by jury in the regular mode of the common law." 5 App. D. C., 5.

Further answering the same objection, the court said:

"All the States of our Union have provisions in their organic law identical with those in our Federal Constitution for the preservation of the right of trial by jury. We have yet to hear that in any State of the Union which has adopted such a code of procedure as we have mentioned, it has ever been held that such procedure was in antagonism to its constitutional guarantees. We find no such antagonism between this rule and our Federal Constitution." Cropley *v.* Vogeler.

But in subsequent cases the court disparages such generality in argument, saying:

"In our own Federal Union of States, while there is a kindred resemblance in the guarantees of personal right that permeate all our constitutions, yet there is also sufficient verbal distinctiveness and differentiation of terms as to give occasion for great difference of judicial decision." 4 App. D. C., 30.

"Nor, in view of the varying terms in which similar statutes in other States are expressed, can we find any great amount of light in the judicial decisions which have been founded upon them." 17 App. D. C., 374.

An additional caution in the same direction is suggested by this court:

"Be a little cautious in citing the works and publications of foreign jurists, since, to comprehend their bearings, such a knowledge of the foreign law as is scarcely attainable is absolutely requisite." 9 How., 415.

Authority to make the rule is put upon the ground that—

"As the court has the right to oversee and regulate the pleadings, it necessarily has also the right to prescribe what those pleadings shall be. This is a power inherent in every court of general jurisdiction by virtue of its constitution." Cropley *v.* Vogeler.

But this court has uniformly recognized the common-law system of pleading as a branch of the common law in force in the District, binding alike upon itself and the inferior courts, in the absence of statutory provisions changing that law; upon that principle it has decided all questions of pleadings in actions at common law in cases arising in the District. 6 Cr., 219; 16 Pet., 301; 1 How., 249; 181 U. S., 122.

"This court does not know that it possesses the power to change the law of pleading, or to admit of evidence inconsistent with the principles which it has prescribed." 6 Cr., 219.

"By the act of Congress of 1801, assuming the government of the District of Columbia, in virtue of the cession from Maryland and Virginia, the laws of these States, and of course the proceedings in their courts, as parts of these laws, were expressly recognized within such portions of the District, respectively, as originally were within the limits of the ceding States." 16 Pet., 301.

And in its last reference to the subject this court recognizes that changes in the common-law system of pleading in the District are to be made by Congress.

"A perusal of the record in this case demonstrates at least how conservative Congress has heretofore been in relation to the adoption of any amendment of the law relating to pleading and procedure in the District of Columbia." 181 U. S., 122.

In no case from the District, in the reports of this court, is there to be found any support for the doctrine that any court has authority to change, by so-called rules of practice, the common-law system of pleading in the District, or to work such a revolution in our procedure as is done by the 73d rule. The rule has produced greater changes in our procedure than all the acts of Congress upon the subject combined.

As it is only questions of law that are reviewable upon

writ of error, every decision of this court upon questions of pleading in actions at law involves an affirmance that such questions are questions of *law*, and not mere questions of practice, which are not, in general, reviewable upon writ of error.

Judicial proceedings in courts of law "ought to be according to the course of the common law, unless otherwise ordered by Parliament; for though the King may erect new courts, yet he cannot alter the established course of law." 3 Black. Com., 81, 84.

"The forms of administering justice, and the duties and powers of courts as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will." Bank of Columbia *v.* Okeley, *supra.*

"The form and effect of judicial proceedings * * * one would naturally assign to the highest legislative authority in a State," and can be exercised in the District only by the direct legislation of Congress, and cannot be delegated by Congress even to a legislative body created by Congress. Roach *v.* Van Riswick, MacArthur & Mackey, 178.

Both by the organic act of the District supreme court and by the present Code the power of that court to make rules is limited to rules of "practice." Sec. 770, R. S. D. C.; sec. 65, District Code. "Practice" is not "pleading" any more than it is "evidence." Practice, pleading, and evidence are well recognized as distinct branches of the law of procedure. The power to make rules of "practice" no more authorizes the court to make rules of "pleading" than rules of "evidence." In no case from this District has this court ever decided a question of pleading in actions at law by reference to the rule book of the trial court.

To change the common-law system of pleading is to change the *law*. But the 73d rule does much more than to change the common-law system of pleading. Under the power to make rules of "practice" the court makes what is

called a rule of "pleading," the effect of which is to dispense with the statutory mode of proof and the constitutional form of trial in cases which, but for the rule, would be tried by that mode of proof and that form of trial.

A part of the reasoning in support of the rule is:

"A suit at common law might well result, and frequently does result, in an issue of law, through the instrumentality of a demurrer, and assuredly it will not be claimed that in such cases there is any right to trial by jury." Cropley *v.* Vogeler.

But authority to render judgment without the intervention of a jury, when the pleadings result "in an issue of law, through the instrumentality of a demurrer," does not tend to prove authority to so render judgment when the pleadings result, as in this case, in an issue of fact. In this case there was no demurrer. The defendant traversed certain material allegations of the declaration, and claimed the right of trial by jury to determine the truth of those allegations; but although there were these undetermined issues of fact between the parties, judgment was rendered against the defendant without trial and without proof.

It is said that the power to make the rule is "a power inherent in every court of general jurisdiction by virtue of its constitution." Cropley *v.* Vogeler. And Fullerton *v.* Bank, 1 Pet., 604, is cited in support of that proposition. In Fullerton *v.* Bank this court was considering the power of a newly organized Federal court to "create a practice," and not with the power of a court to dispense with the statutory mode of proof and the constitutional form of trial. The rule there sustained was a rule adopting the established State practice in regard to the joinder of parties defendant.

It is true that in Fullerton *v.* Bank it is said "as to changes in the mere form of the remedy, the doctrine cannot be maintained, that it is forbidden to the legislative power or to the tribunal itself, when vested with full power to reg-

ulate its own practice" (p. 615). But the District supreme court is not a "tribunal vested with full power to regulate its own practice," but is vested only with power to establish rules of practice "not inconsistent with the laws of the United States."

Answering the objection that the rule was judicial legislation, the court said:

"There remains perhaps the question whether, even if the rule is not in itself unconstitutional, the subject-matter of it is not more properly for legislative action than for judicial intervention. This question was suggested rather than argued by counsel, and we do not deem it necessary to go into it at any length. From what we have already stated, it is apparent in our opinion that the rule is a proper rule of practice to facilitate the administration of justice and to prevent abuse of the processes of the court." Cropley *v.* Vogeler.

After that decision the court regarded the question as "no longer open." 2 App. D. C., 343.

A series of articles entitled "Practice under Rule No. 73," by Judge Cole, of the District supreme court, in the *Washington Law Reporter*, vol. 27, Nos. 43, 44, 46, 47, 48, 49, and 52, show how many novel legal propositions, for which no solution was to be found in the pre-existing law of the District, have been raised by that rule, and how the court in attempting to prevent what it deems abuses of the right of trial by jury has very seriously impaired that right.

It is said that the rule is "salutary," and therefore should be sustained. That was the contention made in support of the rule of the Court of Claims declared void in 13 Wall., 38. The question is not whether the rule is salutary, but whether it is valid; it cannot be salutary if it is invalid.

It is said that the rule has been long in force, and therefore should be sustained. That was the contention made and sustained below in support of the proceedings declared void by this court in Callan *v.* Wilson, 127 U. S., 450, and Capital Traction Co. *v.* Hof, 174 U. S., 1, as infringements

upon the right of the citizens of the District to trial by jury. No statute of limitations runs against that right. The question is not settled until settled by the court of last resort.

It was formerly said in support of the rule that its requirements were "plain and simple." 2 App. D. C., 32. But the courts have since so frequently disagreed as to what constitutes compliance with the rule that the Court of Appeals has expressed the apprehension that the rule might produce more litigation, delay, and expense, by appeals and otherwise, than can ever be prevented by it. 4 App. D. C., 474. That apprehension seems to have been well founded, for subsequently the court said:

"This is another of many cases that have been brought into this court on appeal from judgments rendered under the seventy-third rule of the court below." Washington Times Co. *v.* Wilder, 12 App. D. C., 62.

That case makes clear the extent to which, under the rule, the function of the jury is performed by the court. Summary judgment was there rendered against the defendant upon what the court said "we must suppose," what "is made manifest," what "under the facts disclosed we may reasonably assume," and the "clear proof." That method of deciding facts put in issue by the pleadings is at war with the principles declared by this court in Barney *v.* Schneider, Hodges *v.* Easton, and Baylis *v.* Insurance Co., cited under the second assignment.

The judgment in Washington Times Co. *v.* Wilder, *supra*, and in this case, though nominally judgments at law, are in substance decrees in equity entered upon bill and answer; and, even considered as a decree upon bill and answer, it will be attempted to be shown in section (*d*), *infra*, that the present judgment was entered in direct violation of the principles laid down by this court as governing courts of equity in decreeing upon bill and answer.

The fact referred to in Bank *v.* Hitz and Cropley *v.* Vogeler

that the affidavit of defense system has been adopted in some States by legislative action does not tend to support the claim that the system could be introduced into the District by judicial action, but tends to prove that its adoption is matter proper for the determination of the legislative and not the judicial department.

Congress has not adopted the affidavit of defense system for the District; but Congress has provided that the common law shall remain in force in the District, and the 73d rule "deprives a party under certain conditions of his right to a trial by jury in the regular mode of the common law;" Congress has provided what pleas shall be verified, and that is not all pleas "in bar" in cases embraced by the 73d rule; Congress has provided when defendant in actions at law may be compelled to make discovery, and that is not in all cases embraced by the 73d rule; Congress has provided when the court may try the facts without the intervention of a jury, and that is not in all cases embraced by the 73d rule, and Congress has provided "the mode of proof in the trial of actions at common law," and that mode is not by *ex parte* affidavit. All these provisions of the statutes the 73d rule attempts to supplement or supplant.

"If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State legislatures have a right to interfere, and as it were, by way of complement to the legislation of Congress to prescribe additional regulations and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is as to the direct provision made by it." 16 Pet., 617. The same reasoning applies to rules of court.

In 12 App. D. C., 181, the court rejected the contention

that its own rules could be supplemented by the rules of the trial court, and yet it sustains a rule of the trial court supplementing acts of Congress.

The only legitimate purpose of a rule of "practice" is to facilitate the administration of the law, and not to substitute the provisions of the rule for the provisions of the law. The 73d rule does not, of course, profess to substitute a new form of trial for the constitutional form or a new mode of proof for the statutory mode, but it is more radical than that, for it dispenses with the statutory mode of proof and the constitutional form of trial in cases which, but for the rule, would be tried by that mode of proof and that form of trial without substituting any other form of proof or trial or none worthy of the name, and authorizes summary judgment against defendant in "any action arising *ex contractu*" upon his adversary's *ex parte* affidavit.

In the examination of this subject no act of Congress and no rule of a Federal court (except the 73d rule) inaugurating the affidavit of defense system has been found. The limited extent—falling far short of the scope of the 73d rule—to which that system has been applied in the Federal courts in Pennsylvania, and perhaps in other States where the system is a part of the procedure in the State court, seems to have been upon the authority of the Federal statutes adopting the State procedure.

This court seems never to have passed upon a rule of court "depriving a party under certain conditions of his right to a trial by jury in the regular mode of common law," and it seems to have gone no further in sustaining a rule of court dispensing with formal proof than to sustain a rule which, adopting the State procedure, dispensed with formal proof of the execution of the instrument in suit, unless its execution was denied under oath, and in that case this court said: "If the rule attempted to interfere with, or control the rules of evidence, it certainly could not be supported." Mills *v.* Bank, 11 Wheat., 439. And upon consideration of a like

rule this court said in Sebree *v.* Dorr, 9 Wheat., 563, that such a rule could not be permitted to violate the rule of evidence requiring the production of the best evidence; but the rules under consideration in Mills *v.* Bank and Sebree *v.* Dorr did not attempt to dispense with the constitutional form of trial. Both of those cases were tried by jury.

The best that can be said of the 73d rule is what was said by this court of the act of Congress declared void in Boyd *v.* United States, *supra*, as an infringement upon the citizen's constitutional rights:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

And so it is with the rule. Time and the practical application of the rule have disclosed some objections which are inherent in the trial by the affidavit of defense system; and, in addition to that, it has developed some objections that are not inherent in the system when properly limited, and from which the bill of discovery, to which the rule has been likened, and the affidavit of defense system of Pennsylvania, from which, as generally understood, the rule was adopted, are comparatively free, but which have been developed by

extending the scope of the 73d rule to cases to which bills of discovery and the Pennsylvania system do not extend. See (*b*), (*c*), and (*d*), *infra*.

It was an observation of Mr. Justice Miller that—

"The District of Columbia * * * has preserved the principles of the common law less affected by statute than any part of America and, perhaps, less than England herself." 18 Wall., 150.

Our laws have been administered for a hundred years under the supervision of this court, which has been, in a sense peculiar to the District, the court of last resort. It should, therefore, be especially true of our laws that—

"If it is law, it will be found in our books; if it is not to be found there, it is not law." 116 U. S., 627.

But the argument in support of the rule has all been drawn from the jurisprudence of foreign jurisdictions instead of from the analogies of our own laws. Instead of following the example of Congress, which did not adopt the affidavit of defense system, a Federal court followed the example of the State legislatures which did adopt the system; and instead of resorting to the decisions of this court under the Federal Constitution and statutes to ascertain whether the rule was consistent with the laws of the United States, it resorted to the decision of State courts under State constitutions and statutes.

The rule is inconsistent with the whole course of the legislative history of the District, and it is inconsistent with the whole course of the judicial history of the District as made and recorded by this court. Little by little the 73d rule has dispensed with all, except hearing, that was formerly deemed essential to the due administration of justice, until it has come to be declared that summary judgment may be rendered against a defendant without trial and without proof, though he make oath that he has no knowledge of

the facts upon which he is sought to be charged. Such a rule is abhorrent to the sense of justice.

We are taught that—

"Greater evils could not exist under our form of government than would follow the usurpation by the judiciary of powers not entrusted to them." 2 App. D. C., 246.

If the 73d rule is not judicial legislation, what would amount to such legislation?

While the District supreme court did not propose by its adoption of the 73d rule "to repeal the Constitution," Bank *v.* Hitz, *supra*, yet that court set no other bounds upon its power to make rules. It was not deemed sufficient reason for abstaining from making the rule that "it was matter of serious misgiving to some of the members of the court whether it was not a species of legislation, and whether it was not a denial of the citizen's right under the Constitution. It certainly looked very much like the exercise of legislative rather than judicial power." Bank *v.* Hitz.

Rules of court of such doubtful constitutional validity should not be adopted, and, in the nature of things, cannot be adopted without ultimately destroying principles deemed essential to the preservation of our form of government. In Kilbourn *v.* Thompson, 103 U. S., 168, this court, in administering judicial redress for acts done under sanction of certain proceedings of the House of Representatives, declared in that case unauthorized and void as an infringement upon the jurisdiction of the judiciary department, said:

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether State or national, are divided into the three grand departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also

essential to the successful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

If the executive or legislative department of the Government should transcend its rightful powers, redress may be had in the judiciary department; but if the judiciary department should transcend its rightful powers, the only redress lies in an appeal to that judicial oath invoked by Marshall in Marbury *v.* Madison.

(*b.*) The causes of action are not within the purview of the 73d rule.

Although the causes of action are within the *letter* of the rule, they are not within the spirit of the affidavit of defense system.

The Court of Appeals recognizes implied exceptions to the operation of the rule. "The actions *ex contractu*, to which the rule has reference, are necessarily such as arise upon money demands pure and simple—actions for a liquidated and specific amount of money, for the payment of which there is an express contract between the parties, or for which the law implies a contract." Deane *v.* Echols, 2 App. D. C., 528. See also Bailey *v.* District, 4 App. D. C., 369; S. C., 171 U. S., 161.

The subject of what causes of action are within the purview of the affidavit of defense system is considered at length, both upon principle and the authority of the decisions of the courts of Pennsylvania, where the system seems to have been first developed in "*Endlich on Affidavits of Defense.*"

Endlich, citing many Pennsylvania cases in support of the text, says:

"The demand which the affidavit of defense law makes upon parties sued, to set forth, within a comparatively short

space of time and with a considerable degree of precision and minuteness of detail, a complete defense to the cause of action, must necessarily proceed upon the supposition that the party is *speaking of his own affairs.* Only of them can he have that ready and comprehensive knowledge which will enable him to answer the requirements of the law. Neither statutes nor rules of court need expressly to exempt any class of defendants. But the spirit, the common law of the system, recognizes certain exceptions to its scope, in analogy to the established practice in other particulars." Sec. 317.

Although the rule "is in terms so general as to comprehend all actions, yet it has been construed according to its intent." Sec. 323.

"*Bonds with collateral conditions are not within the spirit or principle of the affidavit of defense rule.*" Secs. 90, 100, 101, 103–105, 107–110. That is this case.

Same is true of a "contract of suretyship for goods, etc., to be furnished to a third person." Sec. 158. That is this case.

"*Instruments which are executory on the plaintiff's part, or which for any reason require averments supplemental to the copy filed, to complete the showing of defendant's liability, are without the affidavit of defense law.*" Secs. 171, 178. That is this case.

"*Contracts under which the defendant's liability is in any manner conditional are outside the scope and legitimate intention of the affidavit of defense law.*" Sec. 182. That is this case.

"It is not every case of assumpsit, express or implied, which comes within the rule, but only where there is some *direct dealing between plaintiff and defendant.*" Sec. 225.

"In the affidavit of defense system, the right of judgment is based, not so much on the original contract, as on the evidence of it, and as to it, a sharp line is drawn between written and parol evidence, *the best evidence being required in every instance to make out the plaintiff's prima facie case. Now, where the contract is or was evidenced by writing, it is the best evidence; parol testimony can be admitted only after the non-production of the writing is accounted for.*" Sec. 227.

"Where this evidence is wanting, the cause of action is incomplete, as viewed from the standpoint of the affidavit of defense rule, and however just and meritorious the plaintiff's claim may be; however clearly, upon the facts shown by him, he may be entitled at the hands of a jury—supposing him to be capable of proving his allegations to its satisfaction—he is nevertheless neither within the letter nor within the spirit of the affidavit of defense rule, and is not entitled to a judgment for default under it." Sec. 228.

"A general and excellent test of the sufficiency of an affidavit of defense is contained in the rule, that, *if it put the plaintiff upon proof of any matter dehors the instrument (or copy), it will be sufficient to prevent judgment. Conversely, if the plaintiff be obliged, in order to make out his case against the defendant, to introduce matters dehors the copy filed by him as the basis and sole evidence of his claim, he cannot be entitled to judgment; for if that rule means anything it means that the plaintiff's case as regards the defendant's liability, must rest upon the face of the copy, unaided by any extraneous averments.*" Secs. 289–293.

The Court of Appeals says:

"We perceive no reasonable ground, whatever, for excepting the surety from the operation of a rule plainly applicable to his principal." Rec., 15.

But is it plain that the affidavit of defense system is applicable to a suit against even the principal on a bond with collateral condition?

The facts necessary to forfeit bonds taken under the acts of 1894 and 1899, to render the surety conditional liability absolute and to determine its amount, are all *dehors* the bonds and contracts, and to be established *aliunde* they are not necessarily or presumptively within the knowledge of the surety; he is not a party to contracts between his principal and the subcontractors. To extend the 73d rule to suits against the surety on such bonds might not only jeopardize his rights, but might also imperil the rights of all other persons for whose protection equally with the use plaintiff in a particular case the statute requires the bond to be given.

(c.) Plaintiff's affidavit is insufficient.

Copies of the bonds in suit and of the contracts between the District and Vinson should have been filed.

This was required by the act under which the bonds were taken and under which the suit was brought. That act authorizes subcontractors to sue upon "a certified copy of said bond and contract."

"As the statute which created the right to such a recovery also prescribed the remedy, that remedy was exclusive of all others for the enforcement of that right." 111 U. S., 197; 6 Cranch, 221.

But the plaintiff was permitted to recover without bringing upon the record copies either of the bonds in suit or of the contracts between the District and Vinson.

"When * * * the case turns, in whole or in part, upon the construction to be given to an instrument in writing, the original, or a copy, should be filed as an exhibit." 7 App. D. C., 207; 15 *ib.*, 408.

"It is its (court's) duty to construe all written instruments given in evidence, as a question of law." 6 Howard, 282.

Whether the materials for which payment is claimed were embraced within the terms of the contracts between Vinson and the District is not a question of fact to be established by Smoot's affidavit alone, but a mixed question of law and fact, and the law should have been determined by the court upon the construction of the said contracts and bonds, and, in their absence, it could not be so determined.

Without violation of the fundamental rule of evidence that the best evidence must be produced, the contents of the bonds in suit and of the contracts between the District and Vinson could not be proved by the plaintiff's *ex parte* affidavit. Endlich, secs. 227, 228, *supra*.

In Sebree *v.* Dorr, *supra*, this court reversed the judgment of the trial court for admitting in evidence a copy of the instrument in suit, no foundation being laid for the intro-

duction of secondary evidence. Answering the contention that a copy was admissible under the State statute (adopted into the practice of the Federal court), dispensing with proof of execution of the instrument in suit unless denied under oath, the court said:

"It would be most dangerous to allow that because the proof of the execution of an instrument was dispensed with, therefore, no proof of its existence * * * was to be required. The production of the originals might still be justly required, to ascertain its conformity to the declaration, to ascertain whether it remained in its genuine state. * * * These are important objects, and which no wise legislature would lose sight of; and it is too much to expect any court of justice to infer, upon so slight a foundation, the abolition of those salutary rules of evidence which constitute the great security of the property and the rights of the citizens."

"If the rule attempted to interfere with, or control the rules of evidence, it certainly could not be supported." Mills *v.* Bank, *supra.*

The Court of Appeals in its opinion (Rec., p. 15) treats this question as though it was one of pleading, but it is one of evidence as to the terms of the bonds in suit and of the contracts between the District and Vinson, and one of law as to the construction of said bonds and contracts.

(*d.*) Defendant's affidavit is sufficient to put the plaintiff to proof.

The defendant in the trial court admitted the facts of which it had knowledge and called for proof only of facts of which it had no knowledge. This would have been sufficient as an answer in equity, and should be sufficient under the 73d rule, to put the plaintiff to proof, for the proceeding under the rule "rather resembles a bill of discovery in equity than a pleading at common law." 5 Wash. Law Rep., 130, *supra.*

This court lays down the rule as to what is a sufficient answer to put the plaintiff to proof thus:

"If the answer neither admits nor denies the allegations of the bill, they must be proved on the final hearing." 6 Cr., 51.

"Authorities are not wanting to the effect that all matters well alleged in the bill of complaint, which the answer neither admits nor avoids, are admitted; but the better opinion is the other way * * * the clear weight of authority is, that a mere statement by the respondent in his answer, as in this case, that he has no knowledge that the fact is as stated, without any answer as to his belief concerning it, is not such an admission as is to be received as full evidence of the fact * * * the answer is deemed sufficient to prevent the bill from being taken *pro confesso*, as it may be if no answer is filed." 7 Wall, 205.

The judgment in this case was rendered in direct violation of that principle. The 73d rule confers upon the plaintiff advantages to which he is not entitled under either the common-law or the chancery system of pleading, and denies to the defendant the protection of either system. The Court of Appeals says (Rec., p. 15) that the surety on the bonds in suit "must deny the justice of the demand under oath, or become liable, like his principal, to the summary judgment." That doctrine is laid down without show of principle or authority, and is without support in the law of the District, save in the 73d rule, which overrides all law, the common law, the statutes, and the Constitution as expounded and administered by the court of last resort, and is so unjust that it has even dulled the sense of justice.

What the supreme court of the District did in Hovey *v.* Elliott by virtue of its "inherent" power to punish for contempt—decree against the defendant without judicial ascertainment of the facts necessary to sustain the decree—it continues to do by virtue of its "inherent" power to make rules of practice.

"How can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render that lawful which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the Government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs they were created to prevent." Hovey v. Elliott.

To sustain the authority of the court to make the rule is to fasten upon us a power destructive of all law and of nearly all justice.

It is submitted that the judgment should be reversed and the case remanded to be tried by due process of law and by the statutory mode of proof and the constitutional form of trial.

Respectfully,

L. H. Poole,
Counsel for the Plaintiff in Error.